

1686. *December.* THOMAS WADDEL *against* GORDON of CRAIGHLAY.

IN a pursuit, at the instance of posterior appraisers, within year and day, against the first, for a share of the rents and profits *pro rata*;—it was alleged for the defender, That, seeing they did not concur before now, and claim their share, he had right to uplift the whole for his own use; by which means he would be soon paid off; 2. The pursuers ought to pay the whole expense of the first appraiser's diligence. The Lords repelled the first allegiance; and found, That the whole expenses should be first deduced off the defender's intromissions with the rents, and the remainder divided *pro rata*; and it appears reasonable that, if the first appraiser or adjudger take his expenses this way, he cannot claim also the benefit of sheriff-fees and penalties in appraisings, or of the additional fifth part in adjudications; since that were double payment; and the posterior appraisers are not to be losers, but only advancers of the expenses.

*Page 79, No. 323.*

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1686. *December.* The LAIRD of LAMINGTOUN *against* LADY BLACKBARONY.

THE Laird of Lamingtoun, craving certification in an improbation, at his instance, against some vassals;—it was alleged for the defenders, That they and their authors had been in immemorial possession of the lands, reputed as feuars, and the immediate author was an appraiser; and 'tis usual for debtors to keep up their writs from appraisers. Answered for the pursuer, That the defenders do not produce any document to instruct that the debtor was vassal, nor any discharge of feu-duty, or entry of heirs or successors; so that the tenor cannot be proven. The Lords delayed extracting for a year, and examined all persons suspect of having writs, or having knowledge thereof. *Page 158, No. 568.*

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1686. *December.* ROBERT CHAPMAN *against* UMPHRA COLQUHOUN.

IN a competition of infestments, it being alleged, That the prior in date was not valid, in respect the sasine proceeded upon a precept of *clare constat*, granted by Bishop Leighton as superior, and was taken after he was removed from his bishopric, when he was civilly dead; and, *mortuo mandatore, expirat mandatum*;—Answered, 1. The bishop's precept is sufficient till his death; and the deposing or translating doth no more prejudice it than if he had sold the superiority after granting of the precept; 2. The succeeding bishop ratified and confirmed the precept and infestment. The Lords sustained the answer, and preferred the prior infestment. *Page 168, No. 605.*

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1687. *January.* DAVID MELVIN *against* ROBERT CARSTAIRS.

AN adjudication being quarrelled as null upon these grounds:—1. It could

neither be sustained as a general nor as a special adjudication ; not as a general, because it adjudges for a fifth part more, and for the composition to the superior, and expenses of infestment, as the Act provides in the case of special adjudications ; nor as a special one, since it proceeds not upon a special rental and probation. 2. The term of payment, of the sum adjudged for, is the next term after a liferenter's decease, which was not declared. Answered, The adjudication was led in the year 1679, when the Act was not fully understood ; and, therefore, some escapes in form should be dispensed with. 2. The term of the liferenter's decease being libelled, and not denied by the debtor, who appeared in the process of adjudication, it needed not be proven. The Lords sustained the adjudication.

*Nota.* The Act of Parliament appoints the fifth part in special adjudications, to be the fifth not only of the principal, but effeiring to the principal and annualrents resting the time of adjudication, and stocked. 2. The clause of redemption provides nothing in relation to the fifth part of penalty, or expenses of adjudication, which yet in justice is due. But, in total adjudications, we adjudge ordinarily for principal, annualrents and penalty, all stocked the time of adjudication into a liquid sum ; and also for the superior's composition, and the expenses of passing infestment in general without liquidations, (which, by the Act, bears annualrent from the time of expending,) and total adjudications are declared, by the Act 1661, redeemable in all points as comprisings : and though there be no sheriff-fee due, yet, seeing, in 1661 the appriser had the penalty free, so now adjudgers ought to have expense of the decret of adjudication and recording, &c. so as the penalty may be free. *Page 3, No. 11.*

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1687. *January.* AUCHINMOULY *against* DOROTHY BUCHANNAN.

AN assignation being quarrelled as null, because consisting of two sheets of paper, and the margin, at the joining, not subscribed by the cedent ;—Answered, The cedent being a wife, had judicially ratified the same in presence of the mayor of Waterfoord, in Ireland, attested by his subscribing indorsed on the first sheet. Replied, The cedent does not subscribe the judicial ratification. The Lords sustained the ratification ; but it appeared that the debtor and the cedent had settled. *Page 23, No. 118.*

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1687. *January.* MARGARET BROWN *against* ANDREW BURNET, MERCHANT in ABERDEEN.

IT was debated, if a substitution to one, in case she die unmarried, did convalesce upon her dying within year and day after her marriage. *Page 48, No. 213.*

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1687. *January.* CLIFTONHALL and His WIFE *against* DAVID OSWALL.

A PERSON named executor and universal legatar by his father, having filled